

MISC. CRIMINAL APPLICATION NO. 5916 OF 1994.

Date of decision: 20.4.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. S.R. Divetia, A.P.P. for petitioner-State.
Respondent-served.

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Coram: R. R. Jain, J.

April 20, 1996.

Oral judgment:

Aggrieved by the order dated 30.9.1994 passed by the learned Additional City Sessions Judge (Court No.15), Ahmedabad, in Criminal Misc. Application No.1805 of 1994 releasing respondent/original accused on bail, the State of Gujarat has filed this application under Section 439 (2) of the Criminal Procedure Code ("the Code" for short hereinafter) for cancellation.

The respondent/original accused was charged for commission of offence under Sections 302 and 324 read with Section 114 of Indian Penal Code for causing death of his real brother, Abdul Rashid. The process has been

served but the respondent has failed to appear to oppose this application.

It is true that every allegation of fact has to be denied else shall be deemed to have been admitted empowering the court to decide the matters on the strength of allegations. Even with this rule also a heavy duty is always cast upon the court to see that no injustice is caused to one who is not before Court. As a cardinal rule, it is for the petitioner who comes before the court to establish his case and then if not denied above rule can be pressed into service. The petitioner-State of Gujarat has come before this court for cancellation of bail. Order of cancellation of bail shall not be passed in mechanical manner. But the petitioner knocking doors has to satisfy the court about concrete and cogent reasons and overwhelming circumstances. Alongwith overwhelming circumstances the petitioner has also to show special reasons germane to cancellation.

While dealing with application for bail, the court has to look at the prima facie evidence disclosed by material placed before it. Sections under which the offence is registered or the accused is charged would be irrelevant as the court prima facie will have to come to conclusion that on material placed before it offence as alleged is established. In the case in hand, the allegations are that owing to some property dispute, altercation had taken place between two real brothers, i.e., the deceased and the accused and that the accused having lost power of self-control owing to grave and sudden provocation, went to nearby shop, came with knife and assaulted and injured the deceased. The allegations in the complaint as well as evidence coming forth from the statements of witnesses is quite consistent to the effect that initially simple altercation had taken place between the deceased and the accused in connection with possession of ancestral property. The altercation had taken place in presence of other family members, including female members. At that time none of the parties had any intention of attacking and assaulting any of them and, therefore, prima facie evidence is sufficient to infer absence of intention for causing death. It is also clear that owing to altercation and passion of heart, the accused lost power of self-control, got provoked, and went to adjoining shop, came with knife and assaulted and injured the deceased. If these are the allegations, reading the evidence as it stands, on its face, the case may prima facie be covered under exception (1) of Section 300 of IPC. If case is covered under exception (1) of Section 300 then the material on record may not be sufficient to

convict for offence under Section 302 of IPC rendering liable for imprisonment for life or death.

The learned Judge has rightly observed that on prima facie evidence if the accused is to be held guilty for offence under Section 304 of IPC then cannot be sentenced for imprisonment for life or death for which there is complete bar for releasing on bail. The power to be exercised under Section 439 is discretionary and has to be exercised judiciously depending upon facts and circumstances of the case. To interfere with the order one has to assail upon legality and propriety and show special reasons. On the face of it, I do not find any error of law apparent on the face of record in appreciating material placed before the lower court and to arrive at prima facie conclusion.

Mr. Divetia, learned A.P.P., has argued that this is not a case of single blow but is a case of successive blows and, therefore, the intention for causing death can be inferred. It is true that it is a case of successive blows but while dealing with this aspect the fact that it was due to grave and sudden provocation cannot lose sight as evident from prima facie allegations. Consequently straight way cannot jump to conclusion quite contrary to allegations.

In view of the foregoing discussion, the application is devoid of merits and deserves to be dismissed. In the result, the application is dismissed. Rule discharged.